STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 9, 2005
v	No. 252515 Kent Circuit Court
PARIS MICHAEL MILLER, Defendant-Appellant.	LC No. 03-004060-FH

Before: Cooper, P.J., and Hood and R.S. Gribbs*, JJ.

PER CURIAM.

Defendant Paris Michael Miller appeals as of right his jury trial conviction of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced as a fourth habitual offender, MCL 769.12, and as a subsequent drug offender, MCL 333.7413(2), to three-and-a-half to twenty-five years' imprisonment. We affirm defendant's conviction and sentence, but remand for amendment of his judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant contends that he received ineffective assistance of counsel, as defense counsel forced him to trial and did not give him an opportunity to accept a plea offer from the prosecution. Absent a *Ginther*[1] hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.[2] Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.[3] To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[3] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

resulted differently.[4] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[5]

The prosecution offered defendant a plea bargain in which defendant would plead guilty to the reduced charge of delivery of cocaine as an habitual offender, second offense under MCL 769.10, and the prosecution would not charge him as a subsequent drug offender under MCL 333.7413(2). Nothing in the record indicates that defense counsel did anything to prevent defendant from accepting this offer. Rather, it appears that defendant chose to reject the offer against his attorney's advice. Accordingly, defendant has not established that defense counsel's performance was deficient.

In the alternative, defendant asserts that the prosecution violated this plea agreement, which required him to waive his preliminary examination. However, it is clear from the record of defendant's waiver hearing that no such plea agreement exists. Rather than agreeing to the prosecution's plea offer, defendant waived his preliminary examination in order to have additional time to consider the offer. The defendant did not waive his right to a preliminary examination in exchange for a reduced charge and his claim is without merit.

Defendant correctly contends that the trial court erroneously sentenced him as both a habitual offender and as a subsequent drug offender. Defendant concedes that the actual sentence imposed falls within the limits provided by MCL 769.12 and MCL 333.7413(2), if either statute had been applied by itself. Because defendant failed to raise this issue at sentencing, we review the claim to determine whether there was plain error that affected defendant's substantial rights.[6]

It was error for the trial court to sentence defendant under both statutes. Defendants subject to sentence enhancement under the controlled substance provisions may not have their sentences doubly enhanced under the habitual offender provisions.[7] The prosecution acknowledges that *Fetterley* prohibits double enhancement, but argues that it does not apply to the instant case because defendant's maximum sentence is less than double the maximum allowed under MCL 333.7401(2)(a)(iv).

Pursuant to the habitual offender statute, "[i]f the subsequent offense is a major controlled substance felony, the person *shall* be punished as provided by part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461."[8] A violation of MCL 333.7401(2)(a)(iv), unlike the offenses committed by the defendant in *Fetterley*, constitutes a "major controlled substance offense" as defined by MCL 761.2.[9] Accordingly, under the plain

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[4] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[5] *Id.* at 600.

[6] *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002).

[7] *People v Fetterley*, 229 Mich App 511, 540; 583 NW2d 199 (1998).

[8] MCL 769.12(1)(c) (emphasis added).

[9] *Fetterley, supra* at 526-528.

language of the statute, MCL 769.12 cannot be used to enhance defendant's sentence in the instant case.[10] The provision mandates that enhancement occur only under the applicable provision of the public health code.

Regardless of this error, the twenty-five year sentence actually imposed is less than the possible forty year sentence that defendant could have received under MCL 333.7413(2). Consequently, we find no plain error affecting defendant's substantial rights and, therefore, decline to remand the case for resentencing. Instead, we remand to the trial court for the clerical task of amending the judgment of sentence so that the enhancement of defendant's sentence is properly based solely on MCL 333.7413(2).

Defendant's conviction and sentence are affirmed. We remand to allow for the amendment of the judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs

[10] We note that if defendant's conviction was not a major controlled substance offense, rendering a sentence enhancement under the public health code improper, defendant could have been sentenced pursuant to the habitual offender statute. See *Fetterley*, *supra* at 540.